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17 **UNITED STATES DISTRICT COURT**
18 **CENTRAL DISTRICT OF CALIFORNIA**

19
20 COLUMBIA PICTURES INDUSTRIES,
21 INC., et al.,

22 Plaintiffs,

23 v.

24 GARY FUNG, et al.,

25 Defendants.

Case No. CV 06-5578-SVW (JCx)
[Judge Stephen V. Wilson, Dept. 6]

**DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTIONS *IN LIMINE***

Hearing: October 28, 2013
Time: 1:30 p.m.
Trial Date: November 5, 2013

TABLE OF CONTENTS

		PAGE(S)
1		
2		
3		
4	I. INTRODUCTION	1
5	II. STATEMENT OF FACTS.....	2
6	A. This Case	2
7	B. Despite Affirming Liability Based On Inducement, The Ninth Circuit Makes Clear Causation Must Be Carefully Assessed In Damages Phase.....	3
8	C. Plaintiffs Seek To Exponentially Expand The Scope Of The Case In The Damages Phase	4
9		
10	III. PLAINTIFFS' MOTIONS IN LIMINE SHOULD BE DENIED.....	4
11	A. The Jury Is Afforded Wide Discretion In Deciding The Amount Of Statutory Damages	4
12	B. Defendants Do Not Seek to Re-Litigate This Court's Finding Of Inducement Liability as to the 44 Works, But Seek To Have Damages Litigated For the First Time In Compliance With The United States Constitution	6
13	1. 3,903 Claimed Works Were Just Identified Last Month, Six Years After Plaintiffs' Summary Judgment Motion Was Presented	7
14	2. The Ninth Circuit Specifically Held That Causation Is An Issue Properly Considered When Deciding Damages.....	9
15	3. Defendants Should Be Allowed To Introduce Evidence Related to Plaintiffs' Mitigation of Damages.....	10
16	C. Defendants Should Be Permitted to Educate the Jury About How Defendants' Websites Fit Within the BitTorrent Ecosystem.....	13
17		
18		
19		
20	IV. CONCLUSION	17
21		
22		
23		
24		
25		
26		
27		
28		

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Autodesk, Inc. v. Flores</i>	
2011 WL 337836 (N.D. Cal. Jan. 31, 2011).....	16
<i>Columbia Pictures Indus., Inc. v. Fung</i>	
710 F.3d 1020 (9th Cir. 2013)	3, 4
<i>Feltner v. Columbia Pictures Television, Inc.</i>	
523 U.S. 340 (1998).....	4, 5
<i>Fitzgerald Publ’g Co. v. Baylor Publ’g Co.</i>	
807 F.2d 1110 (2d Cir. 1986).....	6
<i>Harris v. Emus Records Corp.</i>	
734 F.2d 1329 (9th Cir. 1984)	5
<i>Microsoft Corp. v. Ricketts</i>	
2007 WL 1520965 (N.D. Cal. May 24, 2007).....	16
<i>Muppets Studio, LLC v. Pacheco</i>	
2013 WL 2456617 (C.D. Cal. June 6, 2013).....	16
<i>N.A.S. Impor. Corp. v. Chenson Enters., Inc.</i>	
968 F.2d 250, 252-53 (2d Cir. 1992).....	16
<i>Nexon Am. Inc. v. Kumar</i>	
2012 WL 1116328 (C.D. Cal. Apr. 3, 2012).....	16
<i>Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co., Inc.</i>	
74 F.3d 488 (4th Cir. 1996)	16
<i>Symantec Corp. v. Logical Plus, Inc.</i>	
2010 WL 2330388 (N.D. Cal. June 4, 2010).....	16

STATUTES

17 U.S.C. § 504(c)	4
--------------------------	---

OTHER AUTHORITIES

4 Nimmer on Copyright § 14.04 [B][1][a] (2005).....	9, 10
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U.S. Constitution, 7th Amendment.....4

I. INTRODUCTION

Plaintiffs’ so-called “Motions *In Limine*” (“Motions”) ask the Court to ignore that the Supreme Court has found that in copyright cases, the jury has the power to consider factors that might inform them on what they find fair and just when deciding where on the wide scale—from \$750 through \$150,000 per infringed work—a plaintiff should be awarded statutory damages. Here, assuming the jury awarded the minimum award for all 3,947 works Plaintiffs currently assert, the jury could award as low as \$2,960,250. If the jury awarded the maximum for each work, it would award as high as \$592,050,000. And the jury could award anything in between, and could apply a host of factors in evaluating whether to award different amounts with respect to certain works or types of works or infringements.

Plaintiffs’ Motions in effect ask the Court to allow the jury to consider only evidence of Plaintiffs’ cherry-picked *negative* facts in connection with Defendants’ websites and the alleged infringements, and to prevent Defendants from providing any evidence of mitigating factors such as Defendants’ efforts to remove the infringements at issue as soon as they became aware of them; Defendants’ policies of taking down claimed infringements upon notice; any evidence relevant to the causation analysis demanded by the Ninth Circuit before deciding the “degree” of liability when “calculating damages”; and any evidence about any actual injury (or lack thereof) to Plaintiffs, including any evidence about how Defendants’ system fits within the overall scheme of the Internet and relates to other search engines. In other words, Plaintiffs want the Court to shield the jury from the realities of this case. Rather than allowing the jury to decide what is just here based upon the evidence, Plaintiffs essentially seek to prevent Defendants from presenting any mitigating evidence to defend against the nearly \$600 million in statutory damages sought by Plaintiffs. This is improper under the law, and fundamentally unjust in this case.

Contrary to Plaintiffs’ characterizations, Defendants are not seeking to “shift responsibility” to Plaintiffs or other third parties—but the jury is entitled to evaluate in

the first instance the level of financial “responsibility” appropriate here. It is impossible for the jury to do that without understanding the circumstances surrounding the alleged infringements. Further, the prior findings of inducement were decided long before Plaintiffs had even identified last month the nearly 4,000 new works for which they now seek damages, making Plaintiffs’ argument that Defendants should be barred from “re-litigating” specific issues with respect to any of those works (such as notice, fair use, and failure to mitigate) particularly troublesome and inappropriate.

Statutory damages should not result in a “windfall,” which is precisely what Plaintiffs are seeking here. This is particularly true in a mass copyright infringement case such as this one where the realities of the Internet can expose an Internet service provider to secondary liability for—and hundreds of millions of dollars in potential damages for—potentially thousands of direct infringements that it did not itself commit and may have had no knowledge of at all. The jury must be provided evidence of the relevant facts to inform its broad discretion in awarding a just amount of statutory damages. Because Plaintiffs’ Motions merely seek to block relevant information from the jury, the Court should deny Plaintiffs’ Motions in their entirety.

II. STATEMENT OF FACTS

A. This Case

Defendants’ websites facilitate user searches and access to information—using a similar type of search engine functionality as Yahoo! or Google—and neither store nor transmit any copyrighted material in the process of servicing user requests for search results. Plaintiffs brought this action seeking to hold Defendants liable for inducing certain alleged direct infringements by Defendants’ users through Defendants’ system. While this Court found in 2009 that Defendants were liable for inducing infringement of 44 works, granting Plaintiffs’ motion filed in (and based on a record from) 2007, no damages for any infringements in this case have yet been

1 assessed. While the prior phase focused on inducement of “Box Office Movies,”¹
 2 Plaintiffs are now largely seeking damages for works that are not movies released in
 3 the theaters—but rather are television episodes or other television programming (types
 4 of shows that are widely authorized as available online for free). In fact, more than
 5 3,190 of the 3,947 works at issue are television shows.

6 **B. Despite Affirming Liability Based On Inducement, The Ninth Circuit**
 7 **Makes Clear Causation Must Be Carefully Assessed In Damages**
 8 **Phase**

9 In its decision the Ninth Circuit explained that even though it was adopting a
 10 “loose causation” theory for purposes of assessing injunctive relief, it expected the
 11 District Court would deal more carefully with issues of causation specifically when
 12 assessing damages, stating:

13 We do not decide the degree to which Fung can be held liable for
 14 having caused infringements by users of his sites or trackers. The
 15 only issue presently before us is the permanent injunction, which,
 16 as in *Grokster III*, does not in this case depend on the ‘exact
 17 calculation of infringing use[] as a basis for a claim of damages.’
 18 545 U.S. at 941, 125 S.Ct. 2764. We therefore need not further
 19 entertain Fung’s causation arguments at this time, but leave it to
 20 the district court to consider them, in light of the observations we
 21 have made, when it calculates damages.

22 *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1039 (9th Cir. 2013) (“*Fung*
II”).

23 Thus, the Ninth Circuit made clear that “causation . . . cannot be assumed” and
 24 that Plaintiffs must plausibly link direct infringements of the works to Defendants’
 25 inducements. *Id.* at 1038-39. As the Ninth Circuit explicitly cautioned, “proving that

26 ¹ For example, Plaintiffs argued on summary judgment that Defendants
 27 “systematically encouraged users to upload infringing dot-torrent files for top Box
 28 Office Movies in theatrical release in the United States,” and complained about
 Defendants’ Box Office Movie Feature. [Plaintiffs’ Reply In Support of MSJ at 5:3-
 5) (Dkt. 327) (citing SUF 50; Mem. At 18:14-19:2.)]. This Court and the Ninth
 Circuit both relied on this in their orders.

an entity had an unlawful purpose at a particular time in providing a product or service does not infinitely expand its liability in either temporal direction . . . an individual or entity’s unlawful objective at time B is not a virus that infects all future actions. People, companies and technologies must be allowed to rehabilitate . . . lest the public be deprived of a useful good or service they are still capable of producing.” *Id.* at 1038; *Grokster III*, 545 U.S. at 937; *Sony*, 464 U.S. at 432. To date, there has been no analysis of any temporal association between any of the specific induced infringements of this case and any conduct by Defendants found to be inducing.

C. Plaintiffs Seek To Exponentially Expand The Scope Of The Case In The Damages Phase

Just last month—despite the fact that infringement of only 44 works was at issue in the liability phase—Plaintiffs indicated that they would seek statutory damages for inducing direct copyright infringement of 4,145 copyrighted works in the damages phase. Only after Defendants pressed repeatedly for Plaintiffs to provide chain of title and ownership discovery sufficient to establish ownership of each of the thousands of alleged works, pointed out defects in that a substantial number of registrations and chain of title documents appeared to be missing, and sought *ex parte* relief from the Magistrate, Plaintiffs have now withdrawn almost 200 claimed works, reducing the number of works for which they are seeking damages to 3,947, and thereby reducing potential statutory damages by more than \$3 million. Plaintiffs now seek maximum statutory damages of up to \$150,000 per infringed work, or almost \$600 million for infringements of the remaining works.

III. PLAINTIFFS’ MOTIONS *IN LIMINE* SHOULD BE DENIED

A. The Jury Is Afforded Wide Discretion In Deciding The Amount Of Statutory Damages

17 U.S.C. § 504(c) provides statutory damages for copyright infringement of up to \$150,000.00 per work infringed. In *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998), the Supreme Court held that the Seventh Amendment of the

1 United States Constitution requires a jury trial to determine the amount of statutory
 2 damages in a copyright case. *Id.* at 353. As the Supreme Court explained in *Feltner*,
 3 “[t]he right to a jury trial includes the right to have a jury determine the *amount* of
 4 statutory damages, if any, awarded to the copyright owner.” *Id.* (emphasis in
 5 original). This is because it has “long been recognized” that “the jury are judges of
 6 damages.” *Id.* As the Supreme Court has also held the calculation should be based
 7 on:

8 the court's conception of what is just in the particular case, considering
 9 the nature of the copyright, the circumstances of the infringement and the
 10 like, is made the measure of the damages to be paid, but with the express
 11 qualification that in every case the assessment must be within the
 12 prescribed limitations, that is to say, neither more than the maximum nor
 13 less than the minimum. Within these limitations the court's discretion and
 14 sense of justice are controlling...

15 *F.W. Woolworth Co. v. Contemporary Arts. Inc.*, 344 U.S. 228, 232 (1952) (quoting *L.*
 16 *A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100, 106 (1919)).

17 The jury “has wide discretion in determining the amount of statutory damages
 18 to be awarded, *constrained only by the specified maxima and minima.*” *Harris v.*
 19 *Emus Records Corp.*, 734 F.2d 1329, 1335 (9th Cir. 1984) (emphasis added). The
 20 trier of fact must be guided by “what is just in the particular case...considering the
 21 nature of the copyright, the circumstances of the infringement and the like” *F.W.*
 22 *Woolworth*, 344 U.S. at 232. Courts have considered the following factors as relevant
 23 to informing their determination of statutory damages: (1) the expenses saved and the
 24 profits reaped, (2) the revenues lost by the plaintiff, (3) the value of the copyright, (4)
 25 the deterrent effect on others besides the defendant, (5) whether the defendant’s
 26 conduct was innocent or willful, (6) whether a defendant has cooperated in providing
 27 particular records from which to assess the value of the infringing material produced,
 28 and (7) the potential for discouraging the defendant. *Coach, Inc. v. Am. Fashion Gift*,

CV 12-07647-MWF RZX, 2013 WL 950938, at *2 (C.D. Cal. Mar. 12, 2013); *Coach, Inc. v. Diva Shoes & Accessories*, No. 10–5151 SC, 2011 WL 1483436, at *6 (N.D. Cal. Apr. 19, 2011); ; *see also, Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 144 (2d Cir. 2010) (factors relevant to statutory damages are (1) the infringer's state of mind; (2) the expenses saved, and profits earned, by the infringer; (3) the revenue lost by the copyright holder; (4) the deterrent effect on the infringer and third parties; (5) the infringer's cooperation in providing evidence concerning the value of the infringing material; and (6) the conduct and attitude of the parties.)

“Statutory damages are intended to serve as a deterrent...but that does not justify...a windfall.” *Microsoft Corp. v. Ricketts*, 2007 WL 1520965, at *4 (N.D. Cal. May 24, 2007); *Adobe Sys., Inc. v. Tilley*, C 09-1085 PJH, 2010 WL 309249, at *5-6 (N.D. Cal. Jan. 19, 2010) (concluding that an award of \$50,000 per infringement would be a “windfall” and recommending that the plaintiff instead be awarded less in statutory damages); *Cohorst v. BRE Properties, Inc.*, 2011 WL 7061923, at *14 (S.D. Cal. Nov. 14, 2011) (“Statutory damages . . . can be unconstitutional in application under . . . [the] U.S. Constitution if they constitute ‘excessive fines’ or are imposed without due process of law.”).

B. Defendants Do Not Seek to Re-Litigate This Court’s Finding Of Inducement Liability as to the 44 Works, But Seek To Have Damages Litigated For the First Time In Compliance With The United States Constitution

While Defendants do not intend to seek to revisit any of the concluded liability decisions—Defendants must be permitted to present evidence that may inform the jury when determining statutory damages. Plaintiffs spend six pages arguing incorrectly that Defendants seek to “re-litigate” this Court’s summary judgment findings that Defendants are liable for inducing infringement of some of Plaintiffs’ works. Plaintiffs miss the point—damages have never been litigated in this case, and only 44 works had even been identified as infringed during the liability phase. The jury is given such a very broad range and broad factors to consider so they can decide

1 what is fair when deciding how many millions, or hundreds of millions, to award
2 against an individual with limited resources, Gary Fung, and his small company.

3 Defendants must be able to present evidence to show why under these
4 circumstances—where the infringements themselves were not committed directly by
5 Mr. Fung or his company; Defendants had no specific knowledge of the alleged direct
6 infringements; Defendants followed notice and takedown procedures outlined by the
7 DMCA; and where there is a disconnect between the conduct found “inducing” in the
8 prior decisions and the resulting infringements here—the jury should award well
9 below the maximum available statutory damages. *None* of these issues have been
10 decided, and *all* of these issues bear on damages here.

11
12 **1. 3,903 Claimed Works Were Just Identified Last Month, Six
Years After Plaintiffs’ Summary Judgment Motion Was Presented**

13 Further, what Plaintiffs call a “full and complete evidentiary record” fails to
14 account for the fact that such record was based on a “sample” of 44 works; now
15 Plaintiffs have identified nearly a hundred times that number with close to 4,000
16 works. How could there be undisputed facts that have been litigated regarding works
17 that were not named in this case until 6 years after Plaintiffs submitted the record on
18 summary judgment and claimed infringements that only took place *after* the summary
19 judgment order? Defendants cannot be foreclosed from arguing evidence relating to
20 the broad and unrestricted factors that may inform the jury in a case where damages
21 could be anywhere from \$750 per work infringed (which if all were found infringing
22 would be just under \$3 million), or nearly \$600 million if the jury finds the maximum
23 level of damages appropriate for each of the claimed works. The jury could of course
24 also come up with endless alternate conclusions, and could find the appropriate level
25 of statutory damages differed, for instance, between (1) works that Defendants knew
26 about *vs.* works that they did not; (2) works that are theatre released film *vs.* a TV
27 series or another type of work based on Plaintiffs’ actual damages (or lack thereof);
28 (3) the jury could increase the penalty for works that were shown to be more directly

1 caused by the allegedly infringing conduct (e.g., if Defendants “assisted” a user to
2 locate that work or if “box office” movies were at issue); vs. those that were not
3 related to or specifically implicated by any of the allegedly inducing activities. In
4 short, it is up to the jury. The Court should not restrain the jury from having all
5 available information so that it can attempt to reach the most equitable result in the
6 circumstances.

7 Indeed, in some instances, matters that have been addressed in some respects
8 before will be relevant under a new prism. In other words, the information is no
9 longer weighed to decide inducement, but whether it might assist the jury in
10 exercising its broad discretion in deciding the award of statutory damages. For
11 example, even if Defendants were determined to be ineligible for DMCA safe harbor
12 during the liability phase, the notice-and-takedown procedures that Defendants
13 implement modeled after the DMCA are a relevant mitigating factor. Similarly, the
14 fact that the Court did not ever address whether sufficient notice of the works was
15 received under the DMCA, that notice (or lack thereof) could again become relevant
16 here given that the jury is now asked to decide either work by work or in categories
17 what they consider just and equitable in these circumstances.

18 Plaintiffs seek to rely on a motion *in limine* granted in the *Limewire* case that
19 precluded the defendants in that case from introducing evidence or argument
20 inconsistent with the facts established as a matter of law. Of course a minute entry
21 from a district court in New York is not binding on this Court’s evidentiary
22 considerations in this case. Even if this Court considered that decision, it is
23 distinguishable. First, the Ninth Circuit already determined that a closer look at
24 causation must be made before damages can be decided. *Fung*, 710 F.3d at 1039 (9th
25 Cir. 2013). And other cases in the Second Circuit have held precisely the opposite
26 way as *Limewire* on this issue. *See, e.g., Arista Records LLC v. Usenet. com, Inc.*, No.
27 07 Civ. 8822, 2010 WL 3629688, at *2-9 (S.D.N.Y. Feb. 2, 2010) (notwithstanding
28 grant of summary judgment on direct and secondary liability, considering all of the

1 Second Circuit factors in determining statutory damage amount). Plaintiffs cannot
2 reasonably argue that there are facts established in the record regarding whether
3 Defendants took down or were aware of or removed certain works if they were not
4 even identified until last month, and summary judgment was decided in 2009 based
5 upon a record submitted with Plaintiff's motion for summary judgment in 2007.

6 Plaintiffs also argue that Defendants should be precluded from arguing or
7 presenting any evidence that their infringement was innocent or not willful, due to this
8 Court's anticipated rulings on Plaintiffs' motions for summary judgment. (Mot. at 3
9 n.1.) But even assuming this Court enters an order finding willfulness as a matter of
10 law, the only practical impact is that the ceiling for statutory damages is raised to
11 \$150,000. The degree of willfulness must still be evaluated because it is relevant to
12 selecting an appropriate amount of damages. Professor Nimmer has stated that "the
13 determination of statutory damages within the applicable limits may turn upon such
14 factors as . . . the revenues lost by the plaintiffs as a result of the defendant's conduct
15 and the infringers' state of mind – whether willful, knowing or innocent." 4 Nimmer
16 on Copyright § 14.04 [B][1][a] (2005). As Plaintiffs also acknowledge, "the level of
17 egregiousness of Defendants' infringement" is "a primary consideration for the jury in
18 determining the appropriate level of statutory damages." Although Defendants of
19 course do not seek to relitigate the Court's findings, Defendants submit that evidence
20 rebutting the alleged *egregiousness* of Defendants' infringement will inform the jury
21 in reaching of an appropriate award of damages in this case, and their state of mind
22 regarding the infringements at issue.

23 **2. The Ninth Circuit Specifically Held That Causation Is An Issue** 24 **Properly Considered When Deciding Damages**

25 In affirming this Court in part, the Ninth Circuit made clear that causation
26 issues would be dealt with more closely during the damages phase of this case.
27 Specifically, the Court stated that it did not yet "decide the degree to which Fung can
28 be held liable for having caused infringements by users of his sites or trackers" and

1 “need not further entertain Fung’s causation arguments at this time, but leave it to the
2 district court to consider them...when it calculates damages.” *Fung II*, 710 F.3d at
3 1039.

4 With their Motions, Plaintiffs are advocating that the Court *ignore* this directive
5 entirely, and rather than allow the jury to “consider” causation when “it calculates
6 damages”; Plaintiffs insist that the Court should *preclude the jury from considering it*
7 *before trial*. The Court is not “calculating damages”—that is the jury’s function since
8 *Feltner*. 523 U.S. 340, 353. The Ninth Circuit made clear that “causation . . . cannot
9 be assumed” and that Plaintiffs must plausibly link direct infringements of the works
10 to Defendants’ inducements. *Id.* at 1038-39. Moreover, the panel held that causation
11 must be shown even in an instance where “fault is unquestionably present.” *Id.* As
12 the Ninth Circuit explicitly cautioned, “proving that an entity had an unlawful purpose
13 at a particular time in providing a product or service does not infinitely expand its
14 liability in either temporal direction . . . an individual or entity’s unlawful objective at
15 time B is not a virus that infects all future actions. People, companies and
16 technologies must be allowed to rehabilitate . . . lest the public be deprived of a useful
17 good or service they are still capable of producing.” *Id.* at 1038.

18 Plaintiffs’ attempt to remove the issue of causation from the jury under the
19 guise that this Court has already determined the issue in their favor flies in the face of
20 the Ninth Circuit’s decision and inappropriately expands the Court’s prior rulings.
21 The jury should be allowed to consider, in rendering a fair statutory damages award,
22 whether and to what extent Defendants’ actions caused the infringements at issue in
23 this case.

24 **3. Defendants Should Be Allowed To Introduce Evidence Related** 25 **to Plaintiffs’ Mitigation of Damages**

26 Plaintiffs also seek to prevent Defendants from arguing or introducing evidence
27 that Plaintiffs failed to mitigate their damages. Given the broad discretion the jury
28 may consider before awarding any damages, and given that the alleged infringements
here involve nearly 4,000 works that were only named for the first time on September

1 16, 2013, that Plaintiffs have only just identified the allegedly infringing files last
 2 week, and given that Defendants may have immediately removed the alleged
 3 infringement at issue upon notice, the jury must be permitted to hear evidence
 4 regarding whether Defendants immediately removed any alleged infringement at
 5 issue, *or* whether Plaintiffs provided notice to Defendants of those works, as such
 6 factors could mitigate the amount that the jury believes is appropriate in damages for
 7 that particular work.²

8 Defendants have implemented a copyright policy modeled after the DMCA
 9 under which Plaintiffs could have provided notice concerning alleged infringements of
 10 their works. (Decl. of Gary Fung in Opp. to Pl. Mot. Summ. Jdgmt. on Aff. Defenses
 11 (Dkt. 584-3) at ¶¶ 2-6, 8.) Even if Defendants were not held entitled to DMCA safe
 12 harbor, following such procedures and processing such notices regarding specific
 13 works at issue would have resulted in Defendants taking down or removing access to
 14 Plaintiffs' alleged titles, thereby preventing further harm and mitigating Plaintiffs'
 15 damages with respect to titles that were removed. A jury is entitled to consider
 16 whether that happened.

17 Plaintiffs argue that the Court has already barred Defendants from presenting a
 18 mitigation of damages defense. (Mot. at 13.) As Plaintiffs know, their motion for
 19 summary judgment on this affirmative defense is pending. (*See* Mot. at 3 n.1; Dkt.
 20 564.) Moreover, the Court's earlier holding that "inducement *liability* [does not] turn
 21 on whether Plaintiffs could have mitigated their damages" is not relevant. Even if
 22 failure to mitigate damages does not prevent liability, evidence relating to this subject
 23 might be considered relevant to the jury in deciding where on the wide spectrum to set
 24 statutory damages.

25 Plaintiffs' arguments that Defendants' DMCA defenses have been rejected, and
 26 that Plaintiffs were not obligated to give notice before filing this suit, are straw-men.

27
 28 ² The Court should also bifurcate the damages phase as between the 44 works at issue
 in the summary judgment decision and the 3,903 new works just identified by
 Plaintiffs for the first time last month.

(See Mot. at 11 and n.3.) Defendants are not asking the Court to resurrect their DMCA defenses that were denied by this Court and affirmed on appeal based upon the summary judgment record, which would have immunized Defendants from liability from *any* monetary damages for compliance with the safe harbor. Defendants are seeking to introduce relevant evidence to be considered when determining *how much* monetary damages should be awarded in statutory damages. Moreover, Defendants' argument is not that Plaintiffs were *obligated* to give notice as a prerequisite to suit, but that, under the familiar doctrine of mitigation of damages, Plaintiffs' damages should be reduced due to their failure to take reasonable steps that would likely have lowered their damages, possibly down to zero if the close to 4000 works Plaintiffs have just identified last week as claims for damages were identified to us through our usual notice and takedown process. Plaintiffs' cited cases therefore are beside the point. *See Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1107 (W.D. Wash. 2004) (granting defendant's summary judgment motion where plaintiff never attempted to notify defendant of alleged infringements because, although it was not required to give prior to filing suit, plaintiff was unable to prove defendant's knowledge of infringement); *Viacom Int'l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 521 (S.D.N.Y. 2010) *vacated in part on other grounds*, 676 F.3d 19 (2d Cir. 2012) (granting defendant's summary judgment motion and noting, quoting legislative reports, that although plaintiffs are "not obligated" to give notice in order to bring an infringement action, knowledge of infringement will not be imputed and the DMCA safe harbor may apply).

In addition, to the extent the Court believes that a jury is likely to be confused by Defendants' presentation of such evidence, a limiting instruction would be sufficient to resolve any confusion. *See, e.g., Scott v. Felker*, C07-4279CRBPR, 2009 WL 961404, at *7 (N.D. Cal. Apr. 8, 2009) ("juries are presumed to follow limiting instructions with respect to the purposes for which evidence is admitted") (citing *Aguilar v. Alexander*, 125 F.3d 815, 820 (9th Cir. 1997)). Moreover, that Plaintiffs

1 may choose to put on rebuttal evidence is no reason to foreclose this avenue of
2 argument, and would by no means be a “sideshow.” This is a damages trial, and
3 mitigation issues go directly to the heart of Plaintiffs’ claim for damages.

4 Defendants should be allowed to argue and present evidence of Plaintiffs’
5 failures to mitigate, not only with respect to Plaintiffs’ failure to provide adequate
6 notice of copyright infringement, but all other failures. For example, as Plaintiffs
7 note, Defendants previously have argued that Plaintiffs could have, but did not, create
8 a website containing a database of dot-torrents leading to known or likely infringing
9 files that could have been used as filters, and would likely have prevented much of the
10 infringement at issue in this case. (*See* Mot. at 12.) The jury should be allowed to
11 consider all evidence of Plaintiffs’ failure to mitigate in consideration of the proper
12 statutory damages award in this case.

13
14 **C. Defendants Should Be Permitted to Educate the Jury About How
Defendants’ Websites Fit Within the BitTorrent Ecosystem**

15 Defendants should also be permitted to explain to the jury how Defendants’
16 website functions within and relate to peer-to-peer file sharing through the Internet.
17 BitTorrent technology is a kind of “peer-to-peer” technology, enabling one user to
18 find and share material with others over the Internet, rather than providing access to a
19 centralized repository of files. *Fung II*, 710 F.3d at 1027. This technology is
20 employed by a variety of websites and providers. Users can employ this technology
21 to locate, access, share, and distribute a vast array of content originating from all over
22 the globe. This includes a wide range of non-copyrighted material—including music,
23 films, and other material in the public domain—as well as software, movies, games,
24 music, and other entertainment programming that may be protected by copyright law,
25 for which the copyright holders may or may not have authorized or licensed free
26 distribution.

27 BitTorrent technology breaks up the file into many smaller pieces or data
28 packets, and permits users to download lots of different pieces from different peers at

1 the same time. Once pieces of a file have been downloaded, the file is automatically
 2 assembled into its original form. The recipients of the materials then become sub-
 3 distributors, transferring materials to other recipients. To share copies of games,
 4 films, music, and the like using BitTorrent technology, a publisher first creates very
 5 small files called “torrents” or “dot-torrent” files, which have the file extension
 6 “.torrent.” Torrents are small, special-purpose data packets with metadata describing
 7 much larger content files and include instructions for software to initiate download of
 8 actual content files off-site. Torrents are not subject to copyright protection. Then, the
 9 publisher makes the torrent files available by uploading them to one or more websites
 10 that collect, organize, and index them. *See id.* at 1026-28.

11 Torrent files are indexed by a variety of search engines, including Google,
 12 Yahoo!, and Bing. General purpose search engines like these are participants in the
 13 “multi-actor marketplace” of BitTorrent, along with isoHunt and many others.
 14 Indeed, the vast majority (more than 95%) of torrent files searchable on isoHunt are
 15 also searchable on Google, Yahoo!, or Bing. *See Fung II*, 2010 WL 6762829, at *29
 16 (Br. of Appellants.) After the torrents are created and made available, participating
 17 users trade pieces among themselves. The transient, changing group of participants is
 18 called a “swarm,” and it is not associated with any particular device, provider, service,
 19 or website. *Fung II*, 710 F.3d at 1027. The content of files that are published or
 20 exchanged is typically identified by the name of the files, but such content is not
 21 actually ascertainable except by joining the swarm. *Id.* at 1027-28. Swarm members
 22 can include users located domestically and abroad. The exchange of information
 23 through the swarm is facilitated by “trackers,” which act like an index and manage
 24 traffic. *Id.* “[N]o content is stored on or passes through trackers.” *Id.* at 1028. The
 25 tracker’s primary purpose is to provide a list of peers that have files associated with a
 26 particular torrent file available for download. *Id.* Defendants’ websites—
 27 isoHunt.com (“isoHunt”), Torrentbox.com, and Podtropolis.com—are torrent sites.
 28 They collect and organize torrent files—which, again, are not copyright protected—

1 and permit users to search their collections. Users search these sites by keyword or
2 category (like games, movies, television shows, music, and so on). *Id.*

3 Understanding the nature of Defendants’ business and role in any actual
4 infringement is not “shifting the responsibility” as Plaintiffs claim—it involves
5 educating the jury on the actual role that Defendants played, so they can determine
6 appropriate amount of statutory damages, and relates to what Plaintiffs’ “actual
7 damages” are, if any. As noted in the case relied on heavily by Plaintiffs, *Limewire*,
8 the court noted that the “reality” is that Plaintiffs would have faced competition from
9 other infringers, even if Defendants had not infringed, which would lower their lost
10 profits attributable to Defendants’ conduct. *Arista Records LLC v. Lime Grp. LLC*,
11 785 F. Supp. 2d 423, 426 (S.D.N.Y. 2011).

12 Likewise, because there were (and are) so many other file-sharing and
13 BitTorrent systems distributing the very same torrent files, Plaintiffs’ copyrighted
14 works would likely have been infringed regardless of Defendants’ inducement.
15 Defendants’ expert intends to offer testimony about this, as well as the economic
16 impact of BitTorrent and other file sharing on content sales. This is relevant to the
17 jury’s consideration of causation and, also, the egregiousness of Defendants’ conduct.
18 As the *Limewire* court recognized, even if Defendants cannot use evidence of the
19 existence of other file-sharing websites to rebut causation, “[s]uch evidence may be
20 admissible to show (1) that a diminution in Plaintiffs’ profits over time is only
21 partially attributable to Defendants (because others caused some of Plaintiffs’ actual
22 losses), and (2) the extent to which a large award in this case is likely to deter other
23 infringers.” *Limewire*, 785 F. Supp. 2d at 426. To the latter point, the *Limewire* court
24 held that Defendants could use this evidence to argue that a large damage award
25 would not deter other infringers of Plaintiffs’ works—which is a relevant
26 consideration for statutory damages. *See Coach*, 2013 WL 950938, at *2. It is not
27 that Defendants are arguing that “everybody does it”; but this evidence is relevant to
28 make sure that Plaintiffs do not obtain a “windfall” of statutory damages.

Moreover, whether Plaintiffs' lost profits as a result of Defendants' conduct is a relevant factor in determining statutory damages, and the extent to which they have not lost profits that can be connected to Defendants' conduct, is relevant to the jury's consideration of a proper award. *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 144 (2d Cir. 2010) ("When determining the amount of statutory damages to award for copyright infringement, courts consider . . . the expenses saved, and profits earned, by the infringer" and "the revenue lost by the copyright holder") (citing *N.A.S. Impor. Corp. v. Chenson Enters., Inc.*, 968 F.2d 250, 252-53 (2d Cir. 1992)). The Fourth Circuit is in accord. *Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co., Inc.*, 74 F.3d 488, 496 (4th Cir. 1996) (listing "the actual damages suffered by the plaintiffs" as a factor the jury should consider in determining statutory damages in a case where the infringement was found willful).

Cases within the Ninth Circuit have repeatedly held that statutory damages must bear some relation to actual damages, *even in cases where the defendant's infringement was also found to be willful*. *Muppets Studio, LLC v. Pacheco*, CV 12-7303 JGB FFMX, 2013 WL 2456617, at *2 (C.D. Cal. June 6, 2013) (while the defendant knew she was copying Muppets characters, and therefore "demonstrating willfulness" the plaintiff "has not provided the Court with evidence that the requested amount is proper under the factors listed above" because "[t]here is no evidence of actual profits, or how the introduction of these items specifically affected Plaintiff's profit."); *Nexon Am. Inc. v. Kumar*, 2:11-CV-06991-ODW, 2012 WL 1116328, at *5-6 (C.D. Cal. Apr. 3, 2012); *Autodesk, Inc. v. Flores*, 10-CV-01917-LHK, 2011 WL 337836, at *8 (N.D. Cal. Jan. 31, 2011) (noting that a willfulness finding "does not end the inquiry, however, for the district court is given broad discretion to determine the amount of statutory damages"); *Symantec Corp. v. Logical Plus, Inc.*, C 06-7963 SI, 2010 WL 2330388, at *3 (N.D. Cal. June 4, 2010) (even where evidence of the defendant's willful infringement is considerable, the amount of damages sought by Symantec is "too high" given the plaintiff's "modest profits"); *Microsoft Corp. v.*

Ricketts, C 06-06712 WHA, 2007 WL 1520965, at *4 (N.D. Cal. May 24, 2007) (even where willful, “the Court thinks it just to award statutory damages in the amount of \$1500 per copyright infringed and \$1000 per trademark infringed, for a total of \$12,500 because it was “twice the minimum under each statute to reflect the finding of willfulness” and the “damages, coupled with the permanent injunction granted against defendant, will adequately serve the purpose of deterrence”).

Defendants should not be precluded from introducing evidence to rebut Plaintiffs’ attempt to advocate for the highest level of damages, when Defendants have every right under the law to submit evidence that supports a lower award.

IV. CONCLUSION

Plaintiffs’ Motions *In Limine* are an improper attempt to stack the deck in their favor so that the jury is only allowed to consider select negative facts associated with this Court’s finding of inducement liability, without taking into consideration the entire context of Defendants’ service and actions with respect to the claimed infringements. Plaintiffs will be entitled to put before the jury the Court’s prior finding on inducement liability, but the jury is entitled to consider the full range of factors relevant to a determination of statutory damages. For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs’ Motions.

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